No. 17-1364

IN THE
Supreme Court of the United States

STATE OF NORTH CAROLINA, *ET AL.*,
Appellants,
v.
SANDRA LITTLE COVINGTON, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

MOTION TO AFFIRM

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RESTATEMENT OF QUESTIONS PRESENTED

A three-judge district court unanimously concluded that the North Carolina General Assembly racially gerrymandered 28 state-legislative districts. This Court summarily affirmed that holding and remanded for remedial proceedings. In accordance with this Court's precedents, the district court gave the General Assembly the first opportunity to draw new districting plans and then reviewed those plans to ensure that they in fact remedied the constitutional violations. They did not. The district court found that the General Assembly perpetuated the racial gerrymandering in four districts and exceeded the scope of the Court's remedial order by unnecessarily redrawing five additional districts despite the State Constitution's prohibition on districting more than once per decade.

The questions presented are:

1. Did the district court lack jurisdiction to ensure that the State adopted constitutionally adequate districting plans to remedy the most extensive racial gerrymander in our Nation's history?

2. Did the district court clearly err when it found that the plans adopted by the General Assembly failed to remedy the racial gerrymandering in four districts, based on extensive factual findings—uncontested here—that these districts partook too much of the constitutional infirmities of their predecessor districts?

3. Did the district court abuse its equitable discretion in imposing a remedial plan that cured the federal constitutional violations while also respecting state policy as enshrined in the State Constitution?

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INTRODUCTION

Almost a year ago, this Court summarily affirmed the unanimous finding of a three-judge court that the North Carolina General Assembly had perpetrated the most extensive racial gerrymander in our Nation's history. On remand, the district court gave the General Assembly an opportunity to adopt new districting plans to remedy the 28 districts held to be unconstitutional.

The General Assembly was not up to the task. The district court found, again unanimously, that the General Assembly perpetuated the racial gerrymandering in four districts—two in the Senate map and two in the House map. In addition, the General Assembly gratuitously redrew five House districts that had neither been held unlawful nor bordered a district held unlawful, thus exceeding the scope of the court's injunctive order and violating the State Constitution's prohibition on districting more than once per decade.

With election deadlines looming, the district court adopted a lawful plan drawn by a special master that fully remedied the racial-gerrymandering violations while also complying with all applicable state laws and policies. In doing so, the district court achieved exactly the balance this Court has mandated between respecting a state's redistricting choices and ensuring compliance with the federal Constitution. Appellants now argue that the district court had no power to do any of this, but their arguments lack support in this Court's precedents and would yield absurd results.

First, Appellants advance a radical theory of jurisdiction in redistricting cases. According to Appellants, a state found to have an unconstitutional districting plan can moot the case and strip a three-judge

court of jurisdiction simply by *enacting* a substitute "remedial" plan, regardless of whether that plan actually remedies anything at all. That theory is absurd on its face. It would follow that a state can moot a racial-gerrymandering case in the remedial phase by repealing the offending plan and re-enacting the *exact same plan*. Appellants' jurisdictional theory is so obviously wrong that they themselves took the opposite position in their previous submissions to the district court. They were right the first time.

Alternatively, Appellants argue that the district court should have given them yet another chance to adopt an adequate remedial plan. Appellants are wrong on both the law and the equities. The district court gave Appellants a reasonable opportunity to enact remedial House and Senate plans—more than a year, in fact—and Appellants squandered it. With election deadlines rapidly approaching, and facing the prospect of a *fourth* election under unconstitutional plans, the district court properly ordered judicial relief.

Second, Appellants claim that their substitute plans were an adequate remedy for racial gerrymandering simply because they did not consider racial data in drawing the new districts. Rather than contesting any of the district court's detailed factual findings about the various infirmities in the four districts at issue, Appellants instead argue that the districts are immune from review because the very same map-drawer who created the 28 racially gerrymandered districts in the first place was supposedly race-blind when drawing the substitute districts. Once again, Appellants' theory reduces to absurdity. If Appellants are right, then states can remedy a racial gerrymander just by

unchecking a box in their redistricting software and then re-enacting *the exact same plan* all over again.

This Court's precedents do not countenance such schemes. The harm caused by racial gerrymandering does not reside in legislators' hearts or heads. The harm subsists in the way legislators have divided the people of their state. Those divisions—and the pernicious messages they send to citizens and elected officials—do not go away until the state removes them. Any plan that fails to do that is not a real remedy. Here, the district court found that Appellants failed to enact a real remedy and instead acted to preserve as much of their racial gerrymandering as possible. Appellants do not challenge the district court's factual findings about the many ways in which the four remedial districts at issue perpetuated the prior racial gerrymanders; and in any event, those factual findings are not clearly erroneous.

Third, Appellants contend that respect for federalism means that the district court was required to implement their obvious violation of the State Constitution's ban on mid-decade redistricting. That is backwards. For decades, this Court has instructed that court-drawn plans must comport with "state constitutions insofar as is possible." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Appellants' proposal would require district courts to ignore state constitutions altogether, which flies in the face of the very federalism principles Appellants invoke.

As Appellants would have it, there are no real remedies to be had in racial-gerrymandering cases, only (at most) decade-long sagas of futile litigation. "For the suit has been a futile exercise if the [plaintiff] proves a violation but fails to secure a remedy adequate to

redress it." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961). If the district courts' powers to fashion equitable remedies mean anything in practice, then Appellants must be wrong on all the issues presented in their jurisdictional statement. Not only wrong, but so obviously wrong as to require no further briefing and argument before this Court. For the reasons set forth in this motion, the Court should summarily affirm.

STATEMENT OF FACTS

This Court is already familiar with the facts surrounding the 2011 state-legislative redistricting process in North Carolina. Appellants here are individual legislators in the North Carolina General Assembly, referred to as "Legislative Defendants" in the proceedings below. Appellees, plaintiffs below, are 31 registered voters in North Carolina. Although the State of North Carolina was a party below, it has not joined in Appellants' appeal.

In August 2016, a unanimous three-judge district court held that 28 districts in the General Assembly's state-legislative districting plans (the "2011 Plans") were unconstitutional racial gerrymanders. *Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016). Although the district court declined to order any remedy that would disturb the impending 2016 general election, it instructed the General Assembly to "draw remedial districts in their next legislative session to correct the constitutional deficiencies in the [2011 Plans]." *Id.* at 177. As was clear from this order, as well as the district court's many subsequent orders, the court was not requiring the State to redraw the entire map, but only

the 28 "unconstitutional districts." ECF No. 140 at 2.[1] The Court enjoined the State from holding any further elections until constitutional plans were in place and explicitly "retain[ed] jurisdiction to enter such orders as may be necessary to enforce this Judgment and to timely remedy the constitutional violations." ECF No. 125 at 2.

A. The Initial Remedial Proceedings

Because the district court did not issue its opinion until shortly before the 2016 general election, those elections were held using unconstitutional maps, and numerous members of the General Assembly were elected from racially gerrymandered districts in November 2016 (as they had been in 2012 and 2014). Appellees sought to correct this injustice by asking the district court to order the State to hold special elections under constitutional maps in 2017. ECF No. 132.

Appellants strongly opposed the motion, but they never questioned the district court's continuing jurisdiction over the remedial proceedings. In fact, Appellants themselves proposed the very form of the remedial proceedings to which they now object. In their briefing below, Appellants proposed to submit a remedial plan to the district court by May 1, 2017. ECF No. 136 at 17. Appellees then would have 7 days to raise any objections to those plans, and Appellants would have a chance to respond. *Id.* Appellants assured the district court that, under this schedule, "the Court would have time to review and rule upon any objections by plaintiffs in time to allow the Board of Elections . . . to conduct special elections in November 2017." *Id.*

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[1] All ECF citations are to docket number 1:15-cv-0399 in the United States District Court for the Middle District of North Carolina.

The district court granted Appellees' motion for additional relief and ordered the State to conduct special elections under new maps, giving the General Assembly until March 15, 2017 to enact remedial plans. ECF No. 140. Appellants sought and were granted a stay pending appeal, and this Court later vacated the special elections order. *North Carolina v. Covington*, 137 S. Ct. 1624 (2017) (per curiam). However, the Court summarily affirmed the district court's ruling on the merits. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (mem.). The Court remanded for further remedial proceedings.

B. The Remedial Proceedings on Remand

On remand, the district court invited the parties to submit their positions on an appropriate timeline for the General Assembly to adopt new districting plans and whether additional relief was warranted. ECF No. 153 at 3-4. In their position statement, Appellants acknowledged that the court had "ordered the North Carolina General Assembly *to enact remedial districts . . . to correct the constitutional deficiencies in the 2011 enacted plans*." ECF No. 161 at 6, 31-32 (emphasis added). Appellants likewise acknowledged the district court's jurisdiction to review those plans before implementing them. *See id.* at 29 (proposing a schedule that "would leave time for this Court's review and implementation of the plans in an orderly way in 2018"); *id.* at 31 ("This schedule would also permit the Court to review the plans prior to their implementation for the 2018 election cycle.").

In July 2017, after considering the parties' positions, the district court declined to order special elections. ECF No. 180 at 4. However, the court also declined to

give Appellants an extra four months to adopt remedial plans, citing three reasons.

First, Appellants had already had almost a year to enact remedial plans, and they had made little or no effort to do so. In the district court's words, "[t]he General Assembly's failure to comply with this Court's August 2016 Order or to take any apparent action since the Supreme Court unanimously affirmed this Court's judgment tends to indicate that the General Assembly does not appreciate the need to move promptly to cure the unconstitutional racial gerrymanders." *Id.* at 7.

Second, given the limited scope of the district court's initial order, there was no need to give the General Assembly several more months to comply. As the district court observed, "[n]ot all districts need to be redrawn." *Id.* at 6.

Third, the district court expressed its concern that Appellants' proposed timeline would not leave enough time for the district court to review the remedial plan and, "if the enacted plans prove constitutionally deficient, to draw and impose its own remedial plan." *Id.* at 7.

Accordingly, the district court ordered Appellants to "enact new House and Senate districting plans remedying the constitutional deficiencies with the Subject Districts" by September 1, 2017 (though the court offered to extend that deadline by two weeks on Appellants' motion). *Id.* at 8.

The General Assembly finally convened in August 2017. The redistricting committees appointed Dr. Thomas Hofeller to draw the remedial plans, even though he was the same person who had drawn the

racially gerrymandered districts in the 2011 Plans. *See* J.S. App. 9. His process in 2011 involved the creation of racial exemplar districts—drawn solely on the basis of race—which were then modified slightly to create the districts in the 2011 Plans. J.S. App. 5; *Covington*, 316 F.R.D at 136-37.

As a result of this experience, Dr. Hofeller was so familiar with the racial demographics of the State that, by his own testimony in another case, he did not even need to consult racial data to understand the racial effects of his districting choices. *See* Dep. of Thomas Hofeller 246:10-247:3, *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Jan. 24, 2017), ECF No. 99-34. While Appellants instructed Dr. Hofeller that he was not to consult racial data in drawing the remedial districts, they also instructed him to protect incumbents elected under the racially gerrymandered 2011 Plans as much as possible, J.S. App. 10-11, even incumbents who had publicly announced their decision not to seek re-election, J.S. App. 61 n.7. Appellants further instructed Dr. Hofeller to consult political and election results data, *id.* at 11, in a state where it is well known that "race and party affiliation" are "highly correlated," *Cooper v. Harris*, 137 S. Ct. 1455, 1486 (2017) (Alito, J., concurring in the judgment in part and dissenting in part) (internal quotation marks omitted).

Dr. Hofeller then proceeded with redrawing the 28 racially gerrymandered districts. For reasons Appellants have never explained, J.S. App. 69, the General Assembly also decided to redraw five House districts in Wake and Mecklenburg Counties that had nothing to do with the racial gerrymander: House District (HD) 36, HD 37, HD 40, HD 41, and HD 105. J.S.

App. 67. When the draft House plan was revealed, Appellees' counsel sent the Redistricting Committees a letter explaining that redrawing these districts clearly violated the State Constitution's ban on mid-decade redistricting. J.S. App. 13. But the General Assembly proceeded to adopt these plans anyway.

Appellants submitted their remedial plans (the "2017 Plans") to the district court on September 7, 2017. ECF No. 184. This was more than a year after the district court first ordered that the unconstitutional districts would need to be redrawn. One week later, Appellees submitted their objections to the nine districts at issue in this appeal—following the exact procedure Appellants previously had suggested. ECF No. 187. Appellees raised two objections. *First*, Appellees argued that the 2017 Plans perpetuated the racial gerrymandering in Senate District (SD) 21, SD 28, HD 21, and HD 57. *Id.* at 20. *Second*, Appellees objected to the gratuitous redrawing of HD 36, HD 37, HD 40, HD 41, and HD 105 as exceeding the scope of the district court's remedial order and simultaneously violating the North Carolina Constitution's ban on mid-decade redistricting. *Id.* at 33-42. In response to these objections, Appellants for the first time argued that the case was now moot because the General Assembly had enacted substitute plans and the district court lacked jurisdiction even to review the 2017 Plans. ECF No. 192 at 20 n.4.

After reviewing the parties' submissions and evaluating the relevant evidence, the district court informed the parties that it had "serious concerns" that the 2017 Plans perpetuated the racial gerrymanders in SD 21, SD 28, HD 21, and HD 57. J.S. App. 103. The district court also had serious concerns that the General

Assembly had "exceeded the authorization to redistrict provided in the Court's previous orders," *id.*, by redrawing the five House districts in Wake and Mecklenburg Counties that were not among or abutting any of the 28 districts at issue in the case.

Recognizing that time was of the essence, and that "[c]onstitutionally adequate districts must be in place in time for the 2018 election," J.S. App. 104, the district court appointed Dr. Nathaniel Persily of Stanford University as Special Master to draw alternative plans for these nine districts for the court to consider. J.S. App. 2. The court issued detailed instructions to Dr. Persily on how to proceed, including that he "comply with North Carolina constitutional requirements" to the extent that such requirements were not inconsistent with federal law, and that he consider racial data only "to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law." J.S. App. 16-20, 80-81.

After reviewing the 2017 Plans and the Special Master's recommended plans, the district court concluded that the 2017 Plans failed to cure the racial gerrymandering in SD 21, SD 28, HD 21, and HD 57. J.S. App. 2-3, 50-66. The district court based its conclusions on extensive findings of fact regarding the shape and composition of these districts, along with the process used to draw them. The district court found that the 2017 versions of these districts continued to divide communities on racial lines in much the same manner as their 2011 counterparts and continued to perform poorly on compactness measures. *See* J.S. App. 50-66. Most notably, the district court found that each of these districts closely resembled Dr. Hofeller's 2011 exemplar districts, which were drawn solely on the basis of race.

J.S. App. 54, 55-56, 59-60, 64. Based on these findings, the district court concluded that the 2017 versions of these four districts "partake too much of the infirmity" of their 2011 counterparts and that General Assembly had "validate[d] the very maneuvers that were a major cause of the unconstitutional districting." J.S. App. 48, 61 (quotation marks omitted).

In contrast, the district court found that the Special Master's plan remedied the racial gerrymanders in SD 21, SD 28, HD 21, and HD 57 "by not tracking the contours of their racially gerrymandered versions, and not dividing municipalities and counties along racial lines." J.S. App. 79. The district court also found that the Special Master's recommended plans were more compact than the 2017 Plans and split fewer precincts and municipalities. J.S. App. 79, 90-100.

Regarding the five House districts in Wake and Mecklenburg Counties, the district court found that the redrawing exceeded the scope of its order to remedy the 28 racially gerrymandered districts. J.S. App. 69. As the district court observed, Appellants "did not put forward any evidence showing that revising *any* of the [five House districts] was necessary." *Id.* (emphasis in original). Because there was no need for the General Assembly to alter the boundaries of these five districts, the redrawing exceeded the scope of the remedial order and clearly violated the State Constitution's ban on mid-decade redistricting, which provides that House districts, once established, "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, § 5(4); J.S. App. 69-70.

In adopting the Special Master's plan to cure the four racially gerrymandered districts, therefore, the court declined to implement the General Assembly's alterations to the five additional House districts in Wake and Mecklenburg Counties. Instead, the district court's remedial plan restored those districts to their configurations under the original, legislatively enacted 2011 House Plan. J.S. App. 97-99.

Appellants filed an emergency motion to stay the court's order, *see* ECF No. 243, and an emergency stay application in this Court, *North Carolina v. Covington*, No. 17A790 (U.S. Jan. 24, 2018). This Court declined to stay the district court's order with respect to the remedy imposed to redress the constitutional violations in the four racially gerrymandered districts, but the Court granted the stay "insofar as it directs the revision of House districts in Wake County and Mecklenburg County."[2] 138 S. Ct. 974 (2018).

REASONS FOR GRANTING THE MOTION

Appellants fail to raise any substantial issues that require further briefing and argument before this Court. Instead, they ask this Court to adopt radical theories about federal courts' jurisdiction and remedial powers. These theories are completely at odds with this Court's

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[2] After this Court's ruling on Appellants' stay application, a group of plaintiffs filed a complaint in state court seeking to enjoin the State from using the new House districts in Wake County. Order at 1, *N.C. State Conference of NAACP Branches v. Lewis*, No. 18 CVS 00232 (N.C. Super. Ct. Apr. 13, 2018). The state trial court ruled on April 13, 2018, that although plaintiffs were likely to succeed on the merits of their claim that the General Assembly violated the State Constitution, *id.* at 2, the court would nonetheless deny the preliminary injunction because voting was already underway in Wake County. *Id.* at 2-3.

precedents and quickly reduce to absurdities. The Court should therefore summarily affirm the district court's remedial order.

I. The District Court Had Jurisdiction Over The Remedial Proceedings And Was Not Required To Give The General Assembly Unlimited Attempts To Remedy Its Constitutional Violations.

Appellants' first argument is that the district court "improperly retained jurisdiction over a moot controversy" after the General Assembly "repealed and replaced" the 2011 Plans. J.S. 14. But that is inconsistent with decades of precedent from this Court. Similarly unfounded is the notion that the district court was required to provide the General Assembly with unlimited opportunities—even in the face of an impending election—to get its replacement plan right.

A. The district court had jurisdiction to review whether the 2017 Plans actually remedied the racial gerrymandering in the 2011 Plans.

It is axiomatic that a federal court has authority to order remedies when it finds a constitutional violation, and to ensure that those remedies adequately redress the violation. Appellants cannot credibly dispute that point, so they attempt to fashion a new rule for the remedial phase of redistricting cases. According to Appellants, the only remedy required when unconstitutional districts are struck down is the enactment of new districts. In their view, it does not matter if the new districts actually remedy the constitutional violation. That they exist is enough, and that serves to moot the case and rob the district court of further jurisdiction. Appellants' vision of the remedial phase of redistricting cases would render a liability

finding meaningless and dangle relief beyond the reach of plaintiffs who have proven an unconstitutional racial gerrymander.

Courts routinely retain jurisdiction over remedial proceedings to ensure that their orders are adequately carried out. *See, e.g., Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012) (noting that, following a final judgment on the merits, there was "still a live controversy as to the adequacy" of the remedy, and that respondent was "not entitled to dictate unilaterally the manner in which" it complied with the court's order). This is particularly true in redistricting cases, in which this Court has regularly approved of the district court's retention of jurisdiction. For example, in *Reynolds*, this Court regarded as "commendable" the district court's retention of jurisdiction to afford the "provisionally reapportioned legislature an opportunity to act effectively" before implementing the court's own plan to remedy a one-person-one vote violation. *Id.* at 586-87; *see also, e.g., Scott v. Germano*, 381 U.S. 407, 409-10 (1965) (instructing the district court to "retain jurisdiction of the case and in the event a valid reapportionment plan . . . is not timely adopted" to "enter such orders as it deems appropriate, including an order for valid reapportionment plan").[3] Like so many

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[3] *See also Larios v. Cox*, 300 F. Supp. 2d 1320, 1356-57 (N.D. Ga. 2004) (three-judge court) (retaining jurisdiction "to permit the Georgia General Assembly to submit to the court . . . enacted plans for reapportionment"), *summarily aff'd*, 542 U.S. 947 (2004); *Jeffers v. Clinton*, 740 F. Supp. 585, 602 (E.D. Ark. 1990) (three-judge court) (retaining jurisdiction "as a matter of inherent equitable power" to review the legislature's subsequent apportionment before it could go into effect); *Graves v. Barnes*, 446 F. Supp. 560, 562, 571 (W.D. Tex. 1977) (three-judge court) (per curiam) (exercising the jurisdiction it had retained to implement a new,

district courts before it, the court below exercised its equitable powers to retain jurisdiction "to enter such orders as may be necessary to enforce [its] Judgment and to timely remedy the constitutional violation." ECF No. 140 at 2. That exercise of jurisdiction was proper.

In Appellants' crabbed view of the district court's jurisdiction, the court is there only to enact a remedial plan if the legislature fails to do so. J.S. 14. But that view relies on a misreading of *Reynolds* and its progeny. In *Reynolds*, this Court charged the district court with monitoring the legislature's response not just for its timing, but also for its constitutionality. As this Court stated, "judicial relief becomes appropriate" whenever a "legislature fails to reapportion *according to federal constitutional requisites* in a timely fashion after having had an adequate opportunity to do so." 377 U.S. at 586 (emphasis added).

Similarly, in *Chapman v. Meier*, 420 U.S. 1 (1975), this Court noted that the legislature's charge during the remedial phase is not simply to adopt a plan, but to "enact a *constitutionally acceptable* plan." *Id.* at 27 (emphasis added). And if the legislature "fails in that task, the responsibility falls on the District Court and it should proceed with dispatch to resolve this seemingly interminable problem." *Id.* If the district court's only duty in the remedial phase is to watch the clock to ensure a timely response, this Court's references to

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constitutionally compliant redistricting scheme and noting that such action was "obligatory, both as a matter of constitutional principle, and as the product of the exercise of [the court's] equitable discretion"), *judgment summarily aff'd sub nom. Briscoe v. Escalante*, 435 U.S. 901 (1978).

constitutional "requisites" and "acceptability" would make no sense.

This Court has never strayed from its holdings in *Reynolds* and *Chapman* that the district court has jurisdiction to review the constitutional adequacy of a remedial plan. Indeed, as this Court has stated, after finding a constitutional violation, it is the district court's obligation to ensure that future "elections are held under a constitutionally adequate apportionment plan." *Ely v. Klahr*, 403 U.S. 108, 114-15 (1971). While the legislature is given the first opportunity to develop such a plan, it is the district court that must "*assess the legality of a new apportionment statute* if one is forthcoming" and "prepare its own plan . . . if the official version proves insufficient." *Id.* at 115 (emphasis added). Even when this Court has reversed or vacated a district court's decision to draw its own plan, it has never even hinted at a fundamental jurisdictional defect.

None of the cases Appellants cite are to the contrary. *Growe v. Emison*, 507 U.S. 25 (1993), addressed mootness in the context of simultaneous state and federal actions challenging the constitutionality of the same state plan. *Growe* stands for the unremarkable proposition that a federal-court challenge becomes moot when its proponents obtain the judgment they seek by prevailing on their parallel challenge in state court. *Id.* at 39. That has not happened here.

Appellants also miss the mark by relying on *Hunt v. Cromartie*, 526 U.S. 541 (1999). After this Court found a racial gerrymander and remanded for a remedy in *Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*), the North Carolina General Assembly enacted a new redistricting plan and then "submitted the plan to the three-judge

court to determine whether it cured the constitutional defects in the earlier plan." Br. of State Appellants at 7, *Hunt v. Cromartie*, 526 U.S. 541 (1999) (No. 98-85), 1998 WL 792301. "In that remedial proceeding . . . the *Shaw* plaintiffs . . . were given an opportunity to litigate any constitutional challenges they might have to the [remedial] plan, which the State had enacted under the *Shaw* court's injunction. They elected not to avail themselves of that opportunity." *Id.* at 8. The district court nonetheless exercised "its authority to review the State's proposed remedial plan" and found the plan to be "an adequate remedy for the constitutional defects in the prior plan." *Id.* Subsequently, a different group of plaintiffs challenged the newly enacted plan in the lawsuit that became *Hunt v. Cromartie*. There was never any suggestion that the *Shaw* plaintiffs were required to file a new lawsuit to lodge objections to the *Shaw* remedial plan.

Finally, the cases cited by Appellants that address mootness where a state repeals or amends a statute in the normal course without any federal-court mandate are inapposite. They add nothing to this Court's analysis about the scope of a federal court's duties in the remedial phase of an ongoing racial-gerrymandering case.

This Court should recognize Appellants' jurisdictional argument for what it is: a last-ditch effort to avoid remedying racial gerrymanders that have already persisted through three election cycles. Appellants raised this argument only after it became apparent that the district court might not fully endorse the 2017 Plans. Until then, Appellants proceeded as though it was perfectly appropriate for the district court to consider whether their remedial plans actually provided a remedy. And for good reason. That position

was consistent with this Court's precedents and with fundamental principles about a court's inherent power to enforce its own orders. *See Peacock v. Thomas*, 516 U.S. 349, 356 (1996); *Riggs v. Johnson Cty.*, 73 U.S. 166, 187 (1867) ("[T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.").

Appellants' newly minted argument would strip the district court of power to enforce its order. It would render a district court's finding that a state has racially gerrymandered its maps a victory for the plaintiffs in name only. And it would force successful plaintiffs to start from scratch with a new claim or suit, even if they never received a remedy for the suit they already won. This Court should summarily reject Appellants' argument and the absurd results it would produce.

B. The district court was not required to give the General Assembly an unlimited number of chances to fix its constitutional violations.

In the alternative, Appellants contend that the district court should have given the General Assembly another opportunity to enact an adequate remedy once it found the 2017 Plans constitutionally inadequate. J.S. 31. According to Appellants, as long as the General Assembly remained "ready and willing" to cure the remaining defects in the remedial plans, the General Assembly was entitled to try again. J.S. 33. This theory runs headlong into established precedent constraining a state's role in proposing remedies to its own federal constitutional violations.

As this Court recognized decades ago in *Reynolds*, once a district court finds that a districting plan is unconstitutional, it generally should give the legislature

"an opportunity to remedy" the unconstitutional plan. 377 U.S. at 586; *see also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (state legislatures should receive "a reasonable opportunity . . . to meet constitutional requirements by adopting a substitute measure" where "practicable"). But the legislature's opportunity to remedy an unconstitutional districting plan is just that—an opportunity. If the legislature squanders that opportunity by failing to "reapportion according to federal constitutional requisites in a timely fashion," then "judicial relief becomes appropriate." *Reynolds*, 377 U.S. at 586. Appellants have not cited any case supporting the proposition that legislators are entitled to try as many times as they like to achieve constitutional redistricting plans.

Contrary to Appellants' claim that this case is "virtually indistinguishable" from *Growe*, J.S. 14, it is completely distinguishable. As discussed above, *Growe* involved parallel state and federal challenges to the same districts. This Court addressed "the propriety of the District Court's pursuing reapportionment of Minnesota's state legislative and federal congressional districts in the face of Minnesota state-court litigation seeking similar relief." *Growe*, 507 U.S. at 27. It held that the district court overstepped because it obstructed remedial proceedings in state court, which had already reached the merits on similar claims and was diligently working toward issuing remedial maps. Because the state court did not "fail timely to perform that duty," the federal district court jumped the gun. *Id.* at 34.

This case is nothing like *Growe*. There is no parallel state action seeking to remedy these four racially gerrymandered districts, and the district court did not interrupt any state-court remedial proceedings. The

General Assembly received a reasonable opportunity and a generous amount of time to fix its unconstitutional maps. Under this Court's precedents, the General Assembly was entitled to nothing more.

In addition to being wrong on the law, Appellants are also wrong on the equities. Their failure to produce an adequate remedy raised the specter that voters would have to endure a *fourth* general election under unconstitutional districts. The district court correctly judged that this was unacceptable and that "[c]onstitutionally adequate districts must be in place in time for the 2018 election." ECF No. 206 at 3. The filing period for the 2018 general elections began on February 12, 2018, just over a month after the court's hearing on the 2017 Plans. ECF No. 248 at 16. With yet another general election fast approaching, there was no reason to expect that sending Appellants back to the drawing board would result in a timely remedy. Federal courts are not required to engage in endless back-and-forth with a state legislature just because it professes to be "ready and willing" to try again. The standard that Appellants propose is yet another transparent attempt to curb the district courts' power to right constitutional wrongs.

II. The District Court Correctly Found That The General Assembly Perpetuated Racial Gerrymandering In Four Districts And Properly Imposed A Remedy.

The district court's factual findings that the 2017 Plans perpetuated the unconstitutional racial gerrymandering in SD 21, SD 28, HD 21, and HD 57 were eminently plausible on the extensive record before the district court. Its unanimous conclusion thus easily

"clears the bar of clear error review." *Harris*, 137 S. Ct. at 1478. And the district court acted well within its equitable discretion by adopting the Special Master's recommendations to remedy the racial gerrymandering the General Assembly had perpetuated in four districts.

A. The district court did not clearly err in holding that the 2017 Plans failed to remedy racial gerrymandering in four districts.

Appellants do not dispute a single factual finding below about the four districts at issue here. Appellants do not contest the district court's findings about their shape, composition, or substantial similarity to their 2011 counterparts. Appellants do not disagree that the districts maintain the core constituencies they had under the 2011 Plans, continue to divide counties and municipalities on racial lines in much the same manner, and continue to perform poorly on compactness measures. Appellants do not contest that the four districts closely track Dr. Hofeller's exemplar districts, which were drawn in 2011 for the sole purpose of hitting mechanical racial targets. *Covington*, 316 F.R.D. at 135-37. Indeed, HD 57 took on the shape of one of Dr. Hofeller's exemplars, and SD 28 looks *more* like Dr. Hofeller's exemplar in the 2017 Plan than it did in the 2011 Plan. J.S. App. 55-56, 64.

In short, Appellants do not and cannot dispute that the four districts "share[] many of the constitutional defects" of their predecessors. *Abrams v. Johnson*, 521 U.S. 74, 88 (1997). Because Appellants have not disputed or rebutted any of these factual findings, they cannot seriously contend that "the court below's view is clearly wrong." *Harris*, 137 S. Ct. at 1468.

Once plaintiffs show—as Appellees have already done in this case—that a state has impermissibly divided them into districts on the basis of race, they are entitled to relief that undoes those divisions. So long as those divisions remain enshrined in a state's legislative maps, the injury persists, and the plaintiffs have not received a true remedy. In this respect, the Court's decision in *Abrams v. Johnson* is particularly instructive. In *Abrams*, the district court found that Georgia's Eleventh Congressional District, enacted as part of a 1992 plan, was racially gerrymandered. This Court affirmed the district court's judgment and remanded the case for further proceedings. *Miller v. Johnson*, 515 U.S. 900, 928 (1995). On remand, the legislative defendants "proposed a variety of plans," including one that the Georgia Legislature had passed in 1991. *Abrams*, 521 U.S. at 83. The district court declined to adopt this plan because it "closely resembled the Eleventh District in the [challenged] plan" and thus "shared many of the constitutional defects" as the challenged plan. *Id.* at 83, 88. The racial predominance in the challenged plan and the close resemblance it bore to the 1991 Plan made both plans "improper departure points" at the remedial phase. *Id.* at 90. The district court therefore adopted its own plan that cured the racial gerrymandering. *Id.* at 84. This Court affirmed the district court's remedial order on appeal. *Id.* at 101.

This case requires the same result. After "extensive fact finding," including "a district-specific analysis to determine whether each district's configuration carried forward the constitutional violation, considering a variety of statistical data and testimony," the district court unanimously concluded that the four districts at issue "'partake too much of the infirmity' of their racial

gerrymandered versions" to remedy the constitutional violation. J.S. App. at 48. Nothing more is required in the remedial phase. Indeed, the district court's findings in this case are far more robust than the findings this Court affirmed in *Abrams*. *See Johnson v. Miller*, 922 F. Supp. 1556, 1563 n.9 (S.D. Ga. 1995) (three-judge court), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997).

Instead of trying to show that the district court's findings were clearly wrong, Appellants argue that the 2017 Plans must be an adequate remedy as a matter of law because the map-drawer, Dr. Hofeller, supposedly did not consider racial data. J.S. 20-25. As an initial matter, Appellants' claim that Dr. Hofeller did not consider race when drawing the 2017 Plans because he did not consult racial data is dubious at best. Dr. Hofeller drew the racial gerrymanders in the 2011 Plans, and he has testified in another redistricting case that he was so familiar with the racial demographics of North Carolina that he did not need to consult racial data to understand the racial effects of his choices. Moreover, he was instructed to protect incumbents elected under the racially gerrymandered districts and to consider political data, which is closely correlated with racial data in North Carolina. *See supra* at 8.

But even setting all of those facts aside, Appellants' legal argument is fatally flawed. Under Appellants' logic, the General Assembly could have cured its constitutional violations by re-enacting the *exact same plans* based on a manufactured record that eschewed consideration of racial data. J.S. App. at 49. Appellants cannot launder the unconstitutional districts in this manner or undo the injury of racial gerrymandering simply by claiming to ignore racial data while enacting

substantially the same plans. That would not accomplish the basic purpose of a *remedial* plan, and it cannot be what it means to give plaintiffs meaningful relief for a serious equal-protection violation. It is therefore unsurprising that Appellants have offered no precedent for this radical position.

This Court has long recognized, as the district court explained, that a "statute enacted by a state legislature to remedy an unconstitutional race-based election law can perpetuate the effects of the constitutional violation, and thereby fail to constitute a legally acceptable remedy, *even when the remedial law is facially race-neutral.*" J.S. App. 47 (citing *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915) (emphasis added)). If the "original enactment was motivated by" invidious discriminatory intent and it "continues to this day to have that effect," it violates equal protection. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977).

Moreover, a putative remedy does not escape review simply because there is no *direct* evidence that the legislature considered race. A court can also look to "circumstantial evidence of a district's shape and demographics," *Miller*, 515 U.S. at 916, to scrutinize whether the district still perpetuates racial segregation. That is exactly what the district court did here. Furthermore, against the backdrop of "prior findings of discriminatory purpose," it is reasonable for a district court to adopt remedies that "hedge against the possibility that the [proposed remedial] scheme contain[s] a purposefully discriminatory element." *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982).

Racial gerrymandering injures voters by classifying and separating them into districts on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 649 (1993); *Miller*, 515 U.S. at 911. The harms of racial gerrymandering include not only being personally subjected to a racial classification, but also "being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quotation marks omitted); *see also Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015).

As this Court has previously held, an equitable remedy for a constitutional violation must be *remedial* in nature, "that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (internal quotation marks omitted)). And the same principle applies to racial-gerrymandering cases. *See Shaw II*, 517 U.S. at 915. It follows that a new plan is not an adequate remedy if it divides voters in substantially the same manner as its unconstitutional predecessor and continues to place them in districts represented by incumbents elected on the theory that their primary obligation is to represent the members of only one racial group.

The General Assembly was under an obligation to "enact new House and Senate districting plans remedying the constitutional deficiencies with the Subject Districts." ECF No. 180 at 8. Rather than curing those deficiencies and the injuries they inflicted, the General Assembly perpetuated them. The district

court's factual findings on this score are unchallenged and should be summarily affirmed.[4]

B. The district court properly remedied the four racially gerrymandered districts at issue.

This district court did not abuse its equitable discretion when it adopted the Special Master's recommendation for remedying the four racially gerrymandered districts. The court properly ordered judicial relief, *see supra* at 18-26, and properly allowed the Special Master to consider racial data to the extent necessary to cure the racial gerrymanders.

Appellants insinuate that the Special Master used the district court's permission to consider race to the extent necessary as license to consider race as a predominant motive. J.S. 34-35. On their telling, the Special Master simply manipulated the maps to achieve his desired black voting age population ("BVAP") in each district. Not so. Appellants neglect to mention (much less dispute) the district court's factual finding that the Special Master did not seek or achieve racial targets in formulating his recommended plans. J.S. App. 81-84. The district court also credited the Special Master's eminently reasonable explanation for the BVAP changes: replacing racially gerrymandering districts with districts that comply with traditional districting principles often decreases BVAP. J.S. App. 84. The district court found that reductions in BVAP "fail[] to demonstrate that the Special Master engaged in racial targeting." *Id.* Appellants' rank speculation

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[4] This Court need not hold this case in abeyance for *Abbott v. Perez*, 138 S. Ct. 49 (2017). Nothing the Court decides in *Perez* could answer any question in this case, which has nothing to do with legislative adoption of a court-imposed interim plan.

about the Special Master's secret motive cannot satisfy their burden to show clear error on the district court's part.

Appellants also gloss over the district court's extensive factual findings about the recommended districts. The district court found that the Special Master's recommended districts outperformed the 2017 Plans on several of the State's own redistricting metrics. J.S. App. 78-80, 90-97. For example, the district court found that the recommended districts were more compact and split fewer precincts, municipalities, and counties than their counterparts in the 2017 Plans. These findings undercut any suggestion that the Special Master subordinated traditional districting principles to race, and Appellants do not even try to dispute these findings.

Appellants' argument thus boils down to the contention that this Court must vacate the district court's remedy simply because the district court told the Special Master he was allowed to consider race if necessary. But as this Court has repeatedly recognized, in redistricting, the mapmaker "always is aware of race when ... draw[ing] district lines." *Bethune-Hill*, 137 S. Ct. at 797 (quoting *Shaw*, 509 U.S. at 646). And this Court has long affirmed equitable remedies for equal-protection violations that take race into account to eliminate racial classifications "root and branch." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971) (quotation marks omitted). Indeed, members of this Court have observed that a "race-conscious remed[y]... may be the *only* adequate remedy after a judicial determination that a State or its instrumentality has violated the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.*, 488 U.S.

469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). Far from abusing its discretion, the district court faithfully followed this Court's precedents in allowing the Special Master to consider race to the extent necessary to remedy the constitutional violations.

III. The District Court Did Not Abuse Its Equitable Discretion In Refusing To Order A Remedy That Violated The State Constitution.

Appellants again ignore the remedial nature of these proceedings in claiming that the district court erred by refusing to implement the General Assembly's violations of the State Constitution. Indeed, Appellants turn the federalism principles they invoke on their head. By implementing a remedial plan that both redressed the federal constitutional violations from the racially gerrymandered districts and respected state districting principles, the district court simply applied this Court's clear directive to ensure that court-drawn plans are highly deferential to state policies, particularly those enshrined in a state's constitution.

A. The General Assembly's authority to redistrict was constrained by the district court's prior order.

In some states, a legislature is free to redistrict as many times as it likes. Not North Carolina. The State Constitution forbids the General Assembly from altering state-legislative boundaries more than once per decade. Specifically, Article II, § 5(4) dictates that the General Assembly must redistrict after the decennial census and "[w]hen established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial

census of population taken by order of Congress." N.C. Const. art. II, § 5(4). That provision is unambiguous and has been construed by the State's highest court. *See Comm'rs of Granville Cty. v. Ballard*, 69 N.C. 18 (1873).[5] This provision is binding on the General Assembly "except to the extent superseded by federal law." *Pender Cty. v. Bartlett*, 649 S.E.2d 364, 366 (N.C. 2007) (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002)), *judgment aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009).

Accordingly, the General Assembly was prohibited from redrawing any House district in the 2011 Plans—the General Assembly's original legislative enactment following the decennial census—unless a court ordered that such redrawing was required to remedy a constitutional violation. Here, the district court never held that HD 36, HD 37, HD 40, HD 41, and HD 105 were unconstitutional, never held the districts abutting them unconstitutional, and never ordered them redrawn. The General Assembly was well aware of the scope of the district court's order. When it gratuitously redrew these districts, it "exceeded the authorization to redistrict provided in the Court's previous orders," J.S. App. 103, and simultaneously exceeded the authorization to redistrict provided by the State Constitution. Because there was no lawful authorization

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[5] In addition, as noted above, *supra* n.2, a different group of plaintiffs filed state-court litigation, subsequent to this Court's order on Appellants' stay application, challenging the Wake County districts redrawn in violation of Article II, Section 5. In that litigation, the state court has held that plaintiffs are likely to succeed on the merits of their challenge to the redrawing of the Wake County districts. Order at 2, *N.C. State Conference of NAACP Branches*, No. 18 CVS 00232.

for the redistricting, the General Assembly violated its constitutional obligation to leave the districts "unaltered."

Appellants could not credibly argue that the General Assembly would have been entitled to enact a new redistricting plan in 2017 absent a court order. Indeed, the district court's "order invalidating the lines surrounding the twenty-eight districts provided the sole authority for the General Assembly to ignore the North Carolina Constitution's ban on mid-decade redistricting." J.S. App. 35. The General Assembly's authority to alter district boundaries that otherwise were required to "remain unaltered" derived from the federal court's order and was thus circumscribed by it. In finding that the General Assembly exceeded the scope of the redrawing authorized by the court, the district court was not adjudicating state-law claims. It was merely enforcing its own prior injunction of the 2011 Plans. "[A]n injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961).

In evaluating whether the General Assembly complied with its order and provided an adequate remedy for the federal constitutional violation, the district court properly considered state law. This Court has made clear that when ordering and overseeing equitable relief in redistricting cases, district courts may not "brush[] aside state apportionment policy without solid constitutional or equitable grounds for doing so." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). In particular, a federal court in a remedial proceeding must

attempt to comply with "state constitutions insofar as is possible." *Reynolds*, 377 U.S. at 584.

These concerns about following state law to the extent possible are particularly heightened when—as here—a federal court must adopt a plan of its own to remedy the constitutional violation. *See Upham v. Seamon*, 456 U.S. 37, 42 (1982); *White v. Weiser*, 412 U.S. 783, 793-97 (1973); *Chavis*, 403 U.S. at 160-61. Here, the district court had to assume the "unwelcome obligation," *Connor v. Finch*, 431 U.S. 407, 415 (1977), of crafting a remedial map because the legislature failed to remedy its racial gerrymandering in four districts. In doing so, the district court demonstrated the utmost respect for principles of federalism and the primacy of state actors and state policies in the redistricting process. *See, e.g.*, *Growe*, 507 U.S. at 34.

By imposing a remedial map that restored the five House districts in Wake and Mecklenburg Counties to their original configuration in the 2011 legislatively enacted plan, the district court ensured the implementation of a remedy that "accommodate[d] the relief ordered to the apportionment provisions of [the] state constitution[] insofar as possible." *Reynolds*, 377 U.S. at 584; *see also Perry v. Perez*, 565 U.S. 388, 392-94 (2012) (instructing a court drawing a remedial plan to modify the state's enacted plan as narrowly as possible). That is exactly what this Court's precedents have required.

B. There are no Eleventh Amendment or standing impediments to the district court's remedial order.

Appellants contend that "[t]he Eleventh Amendment forbids federal courts from enjoining state

laws on state-law grounds," J.S. at 28. But that is beside the point. As discussed above, the district court was not enjoining state laws on state-law grounds. When the district court concluded that the 2017 Plans failed to fix the racial gerrymandering and exceeded the scope of the court's prior order, the court was required to implement its own remedy. That remedy was subject to "stringent standard[s]," including compliance with the State Constitution. *See Wise*, 437 U.S. at 541; *Upham*, 456 U.S. at 43-44. Deference to state redistricting requirements—including and especially those set out in a state's constitution—is not only permissible, but required by this Court.

Appellants' invocation of *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) is thus inapposite. As Justice Scalia wrote for the plurality in *Branch v. Smith*, 538 U.S. 254 (2003): There is "no conflict with *Pennhurst*" where a "federal court grant[s] relief on the basis of federal law" while also "defer[ring] to the State's 'policies and preferences' for redistricting." 538 U.S. at 278 n.* (plurality) (citation omitted). That includes state policies expressed in a state's constitution. *Id.* at 278. Indeed, "[f]ar from intruding on state sovereignty, such deference respects it." *Id.* at 278 n.*

The court below did not issue any injunction against the 2017 Plans. Rather, the court "approve[d] and adopt[ed] the State's 2017 Plans, as modified by the Special Master's Recommended Plans." J.S. App. 101. Even assuming, however, that the modification of the five districts in Wake and Mecklenburg could be construed as an injunction, there still would be no issue under *Pennhurst*. As the district court found, the 2017 Plans failed to comply with *federal* law and exceeded the

authority to redistrict provided by a *federal* court order. Because there were federal grounds sufficient to justify any injunction, *Pennhurst* has no bearing. It is settled law that a federal district court is empowered to enjoin state action and enactments on federal-law grounds. *See Pennhurst*, 465 U.S. at 105. There is therefore no conceivable Eleventh Amendment problem with the district court's equitable remedy.

For similar reasons, Appellants' arguments on standing are unavailing. If this were a newly filed action alleging racial gerrymandering, Appellants could indeed argue that "individuals do not have standing to challenge districts in which they don't reside." J.S. 26; *see United States v. Hays*, 515 U.S. 737, 738-39 (1995). However, these are not new legal challenges for which plaintiffs must assert independent standing; they are objections made in the course of a remedial proceeding.

Appellees obtained a favorable judgment and retained an interest in ensuring that they received the relief to which they were entitled. In such circumstances, a party always has standing. As this Court has stated, "[a] party that obtains a judgment in its favor acquires a 'judicially cognizable interest in ensuring compliance with that judgment . . . . The standing inquiry . . . turns on the alleged injury that prompted the plaintiff to invoke the court's jurisdiction in the first place." *Salazar v. Buono*, 559 U.S. 700, 712-13 (2010). Appellants' argument is therefore "not an argument about standing but about the merits of the District Court's order." *Id.* at 713. For the same reasons noted above, Appellants' standing arguments fail.

In sum, the district court acted well within its equitable discretion in imposing remedial plans that

redressed the federal violations while respecting state policy. The Court should summarily affirm.

CONCLUSION

The motion to affirm should be granted.

Respectfully submitted,

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